

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Case No. 2010090979

JUSTIN G.

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

DECISION

The hearing in the above-captioned matter was held on March 7, 2011, at Tehachapi, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. Kern Regional Center (KRC or Service Agency) was represented by Jeffrey F. Popkin, LCSW, ACSW, C-ASWCM, Associate Director. Claimant Justine G. (Claimant or Justin) was represented by his parents, Cynthia S. and Ron S.¹

The above-captioned matter was consolidated for hearing with two other cases, which involved Claimant's siblings, as the cases involved common questions of law and fact. Those other cases have case numbers 2010070099 and 2010090026. However, a separate decision will issue in each case.

Evidence was received, argument was heard, and the case was submitted for decision on March 7, 2010.

¹ Initials are used for the family surnames to protect Claimant's privacy.

ISSUE PRESENTED

The issue in this case is whether Claimant is entitled to an eligibility assessment from KRC under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.²

FACTUAL FINDINGS

1. Claimant is an 15-year-old boy who lives with his adoptive parents and two siblings within the Service Agency's catchment area. In 2010, his parents, acting on his behalf, sought eligibility from the Service Agency.

2. On August 30, 2010, KRC issued a Notice of Proposed Action, denying Claimant a diagnostic evaluation. The reason for that denial was a claim by KRC that a review of records from various agencies showed that he did not have an eligible condition. Section 4642 was cited as legal authority for the action.

3. Thereafter, on September 21, 2010, Claimant's parents filed a Fair Hearing Request. Claimant's parents thereafter moved to consolidate this case with the two cases pending on behalf of his siblings, which motion was granted. All jurisdictional requirements have been met.

4. Claimant was a premature baby, weighing just over three pounds when he was born. He was exposed to drugs and alcohol in utero, and he was diagnosed as failing to thrive in 2002. Mrs. S. described how, as a child, he could not hold formula down, and he had to be fed every hour.

5. Claimant received Early Start services from the North Los Angeles County Regional Center (NLARC) prior to his third birthday, although the record does not reveal the exact basis of eligibility, nor does it reveal what, if any services were provided to him.

6. In 2001, shortly after his fifth birthday, Claimant underwent a psychological evaluation, performed by Larry E. Gaines, Ph.D., a licensed psychologist who practices in the Los Angeles area. Dr. Gaines notes, on the first page of his report (Ex. 5), that he had previously performed a psychological evaluation of Claimant at the behest of "the Regional Center" which is an apparent reference to NLARC. (*Id.*, p. 1.) Dr. Gaines notes that in the prior assessment Claimant was "identified with" Expressive Language Disorder and Attention Deficit

² All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

Hyperactivity Disorder, Combined Type (ADHD). During that prior assessment Dr. Gaines found Claimant's cognitive skills to be within the normal range.

7. Dr. Gaines states, in his 2001 report, that the then-current regional center reports were concerned with autistic behavior, as Justin was showing signs of being obsessive about some topics, although he was described as affectionate and capable of good eye contact and interpersonal interaction.

8. Dr. Gaines administered an IQ test, the Stanford Binet Intelligence Scale, Fourth Edition (Stanford). Once again, Claimant was functioning in the average range of ability. The overall IQ was 97 (100 being average), with all four of the domains tested (verbal reasoning, abstract visual reasoning, quantitative reasoning, and short term memory) falling into the average range as well.³ (Ex. 5, pp. 2, 6.)

9. Dr. Gaines also administered the Vineland Adaptive Behavior Scales (Vineland). Here, Claimant's scores were not as solidly average as his IQ scores. The overall adaptive behavior composite score was 72, a borderline score. In the socialization domain, his score was a 70, two deviations below the mean, placing him in the second percentile. Daily living skills was a 74, and communication was 82. His strongest area, motor skills, was an 85. (Ex. 5, p. 6.)

10. Dr. Gaines noted that Claimant did not exhibit ADHD symptoms during the assessment, as he had during the prior assessment, but Claimant's mother informed him that such was still a significant problem for the boy, describing various behaviors to the examiner that were consistent with ADHD.

11. Dr. Gaines concluded that Claimant presented with symptoms along the impulse-control continuum, rather than along the autism continuum. He once again diagnosed ADHD, Obsessive-Compulsive Disorder (Provisional), and Tourette's Syndrome (Rule Out.) He found no diagnosis or condition on Axis II.

12. Dr. Gaines twice tested Claimant's IQ and found it average. Similar results were obtained when Claimant received a battery of tests at UCLA in May 2009. At that time, his IQ, as measured with the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), was at 94, placing him in the 34th percentile and well into the average range. (Ex. 6, p. 2.) It should be noted, however, that his processing speed fell into the 2nd percentile. (Ex.6, p. 5.)

13. In 2009, UCLA administered a Vineland test, and he fell into the 14th percentile in terms of communication skills, and the 13th percentile for daily living skills. In terms of social and relationship skills, he was in the 27th percentile. (Ex. 6, p. 7.)

³ The four domain scores were 107, 98, 94, and 100, respectively.

14. In 2001, Claimant was examined at UCLA to assess whether he might suffer from Fetal Alcohol Spectrum Disorder. He was diagnosed as suffering from Alcohol Related Neurodevelopmental Disorder. According to the report, this indicates Claimant suffered from exposure to alcohol before he was born. He suffers from central nervous system impairment but he does not exhibit physical features or growth deficits associated with Fetal Alcohol Syndrome, the most serious type to be found on the spectrum. (Ex. B.)

15. During the hearing, Claimant's parents described deteriorating behavior of the most serious type. Claimant is virtually out of control, has had several contacts with law enforcement, and fails to conform to the basic norms set out for him by his parents. He has stolen from his parents, and led his younger brother into such misdeeds. He has threatened his parents and siblings, and is prescribed psychotropic medications. He lies, cheats, steals, and manipulates, especially galling for his parents, who are religious people. He appears to have little hope of economic self-sufficiency in the near future.

16. (A) Notwithstanding his escalating maladaptive behaviors, there is no indication that he suffers from Mental Retardation.

(B) The Diagnostic and Statistical Manual of Mental Disorders IV, Text Revision, published by the American Psychiatric Association (hereafter DSM), is the most widely accepted source of diagnostic criteria for developmental disorders such as Mental Retardation and Autism. It teaches that the essential features of mental retardation are a significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning, in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. (DSM, p. 41.) "Significantly subaverage intelligence" is defined as an IQ of about 70 or below; there is a possible error of measurement of approximately five points, depending on the IQ test used. (*Id.*) Put another way, "significantly subaverage" translates to IQ scores falling in the second percentile. It must also be noted that for a person to receive a diagnosis of mental retardation, the onset must occur before age 18.

(C) Given Claimant's average IQ, found by three different exams, it cannot be found that he is mentally retarded.

17. There has never been any indication that Claimant suffers from Cerebral Palsy or Epilepsy. While there was concern expressed in 2001 that Claimant engaged in autistic behaviors, Dr. Gaines did not diagnose such, or any of the related maladies that are considered part of the autism spectrum.

18. To find that a person suffers from Autistic Disorder, the DSM requires that impairments in social interaction and communication be found, through examination of certain criteria, and there must also be evidence of restricted repetitive and stereotyped patterns of behavior, interests, and activities. There must be delays or abnormal functioning in social interaction, or language as used in social communication, or symbolic or imaginative play, before three years of age. Further, the disturbance must not be better accounted for by Rhett's Disorder or Childhood Disintegrative Disorder. The diagnostic criteria lay out certain touchstones within each of the aforementioned areas, and the person in question must meet a number of the criteria; the symptoms must be significant.

19. Not only did Dr. Gaines not find a hint of Autism, there is no other reliable evidence to support the notion that Claimant is autistic. Instead, it appears that his problems are mainly psychiatric.

LEGAL CONCLUSIONS

1. Jurisdiction exists to conduct a fair hearing in the above-captioned matter, pursuant to Code section 4710.5, based on Factual Findings 1 through 3.

2. The Lanterman Act, at section 4512(a), defines developmental disabilities within the meaning of the Lanterman Act as follows:

“‘Developmental disability’ means a disability which originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.”

This latter category is commonly known as “the fifth category.”

3. (A) Regulations developed by the Department of Developmental Services, pertinent to this case, are found in Title 17 of the California Code of Regulations (CCR). At section 54000 the statutory definition of “developmental disability” is essentially reiterated. The developmental disability must originate before age eighteen, be likely to continue indefinitely, and constitute a substantial handicap for the individual.

(B) Under section 54000, subdivision (c), some conditions are excluded. They are:

“(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.”

4. (A) The regulations also speak to the definition of substantial disability. CCR section 54001(a) provides that,

“‘Substantial disability’ means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

- (A) Communication skills;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.”

5. (A) Section 4642 provides, in pertinent part, that “any person believed to have a developmental disability, and any person believed to have a high risk of parenting a developmentally disabled infant shall be eligible for initial intake and assessment services in the regional centers.” The statute defines initial intake to include the provision of information and advice about the nature of and availability of

services that are provided by regional centers and “other agencies in the community.” Those other services might include mental health, housing, education, and vocational training. The statute concludes by stating that “intake shall also include a decision to provide assessment.”

(B) The Service Agency provided initial intake, as it reviewed records and provided information to Claimant’s mother. (See Factual Finding 2.) However, the decision was not to provide assessment. Section 4642 may be read as making assessment optional, and not mandatory.

6. The Service Agency does not believe that Claimant suffers from a developmental disability, as that term is used in the Lanterman Act and its attendant regulations. That belief is reasonable given this record. Claimant’s IQ is solidly average, and while the 2009 Vineland scores were not stellar, they are not two standard deviations below the mean. Simply put, there is no indication Claimant is mentally retarded. Likewise, there is no evidence he suffers from Autistic Disorder, Cerebral Palsy, or Epilepsy. Instead, it appears that his condition flows solely from the pernicious effects of Fetal Alcohol Syndrome, which is not an eligible condition. In the main, his issues appear to be psychiatric, effectively barring access to services under the Lanterman Act. Given that there is no evidence of an eligible developmental disability, the decision by the Service Agency not to provide assessment will not be set aside, on this record. Should information be developed in the future that might cause a change in the point of view, Claimant may apply for intake and assessment at that time.

ORDER

The appeal of Claimant Justin G. for assessment is hereby denied.

May 27, 2011

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

NOTICE:

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.